Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

JOHN C. ADAMS, JR.,

Petitioner,

vs.

STATE OF CONNECTICUT,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Connecticut

PETITION FOR A WRIT OF CERTIORARI

JOHN R. WILLIAMS
51 Elm Street
New Haven, CT 06510
(203) 562-9931
Attorney of Record for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTION PRESENTED

Did the court's charge on self-defense violate the petitioner's due process right to trial before a jury properly instructed on the theory of defense supported by the evidence in this case?

TABLE OF CONTENTS

	Page
Question Presented	i
Table of Authorities	iii
Petition for a Writ of Certiorari	1
Opinions Below	1
Jurisdiction	1
Constitutional and Statutory Provisions Involved	1
Statement of the Case	3
Reasons for Granting the Writ	9
Conclusion	11

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Government of the Virgin Islands v. Smith, 949 F.2d 677 (3d Cir. 1991) 10

Holloway v. McElroy, 632 F.2d 605 (5th Cir. 1980) 10

Isaac v. Engle, 646 F.2d 1129 (6th Cir. 1980) 10

Quercia v. United States, 289 U.S. 466 (1933) 11

Smart v. Leeke, 856 F.2d 609 (4th Cir. 1988) 10

Tennon v. Ricketts, 642 F.2d 161 (5th Cir. 1981) 10

Washington v. Texas, 388 U.S. 14 (1967) 9

STATE CASES

State v. Carter, 232 Conn. 537 (1995) 9

State v. Moore, 31 Conn. 479 (1863) 9

FEDERAL STATUTE

28 U.S.C. § 1257(a) 1

STATE STATUTE

Conn. Gen. Stat. § 53a-19(b) 2, 10

Conn. Gen. Stat. § 53a-55(a) 2

Conn. Gen. Stat. § 53a-100(a) 3

PETITION FOR A WRIT OF CERTIORARI

The petitioner, John C. Adams, Jr., petitions for a writ of certiorari to review the judgment and opinion of the Supreme Court of the State of Connecticut.

OPINIONS BELOW

The opinion of the Supreme Court of the State of Connecticut was rendered on April 25, 2000, and was published at 252 Conn. 752. It is printed as Appendix A to this petition. The opinion of the Connecticut Appellate Court rendered on April 13, 1999, and was published at 52 Conn. App. 643. It is printed as Appendix B to this petition.

JURISDICTION

The Connecticut Supreme Court rendered the final decision on the petitioner's direct appeal on April 25, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed. . . .

The Fourteenth Amendment to the United States Constitution provides, in pertinent part: "No state shall . . . deprive any person of . . . liberty . . . without due process of law. . . . "

Section 53a-19 of the Connecticut General Statutes proves, in pertinent part:

"(a) Except as provided in subsection[ ] (b) . . . of this section, a person is justified in using reasonable physical force upon another person to defend himself or a third person from what he reasonably believes to be the use or imminent use of physical force, and he may use such degree of force which he reasonably believes to be necessary for such purpose; except that deadly physical force may not be used unless the actor reasonably believes that such other person is (1) using or about to use deadly physical force, or (2) inflicting or about to inflict great bodily harm.

"(b) Notwithstanding the provisions of subsection (a) of this section, a person is not justified in using deadly physical force upon another person if he knows that he can avoid the necessity of using such force with complete safety (1) by retreating, except that the actor shall not be required to retreat if he is in his dwelling, as defined in section 53a-100. . . .

Section 53a-55(a) of the Connecticut General Statutes provides in pertinent part: "A person is guilty of manslaughter in the first degree when: . . . (3) under circumstances evincing an extreme indifference to human life, he recklessly engages in conduct which creates a grave risk of death to another person, and thereby causes the death of another person.

Section 53a-100(a) of the Connecticut General Statutes provides in pertinent part: "The following definitions are applicable to this part: . . . (2) "dwelling" means a building which is usually occupied by a person lodging therein at night, whether or not a person is actually present; (3) "night" means the period between thirty minutes after sunset and thirty minutes before sunrise.

STATEMENT OF THE CASE

This is the tragic case of a teenage boy, victimized along with his mother by years of horrifying abuse at the hands of a brutal and drunken father, who in the course of yet another assault stabbed and killed his abuser.

In October of 1993 the petitioner was exactly two weeks past his sixteenth birthday. He lived with his mother, a New Haven school teacher, and his younger brother in a house in an adjoining town which was owned jointly by his two parents. He attended a local public high school.

His parents, although still married, had been separated for years and his father lived with his girlfriend and her son in an apartment located elsewhere in the same town. He kept a key to the house, however, and occasionally spent nights there. Mrs. Adams had agreed to let him stay at the house Tuesday, Wednesday and Thursday nights if he wished, since he was less likely to be drunk those nights, but he only sporadically did so and often would go two weeks at a time without seeing his wife or his children.

When he did visit, as earlier before he had moved out, the elder Mr. Adams created a nightmare for his family. An out-of-control alcoholic, he was verbally and physically abusive to the entire family. He once bashed the petitioner's head on the ground and kicked him for missing a cast on a fishing trip. He had thrown the petitioner against a cocktail table, lacerating his lip. He struck him with a baseball bat, dislocating his knee. He pushed him down the basement stairs in front of guests, pushed him down stairs on other occasions as well, often threatened to shoot him, and routinely berated him, telling him he was worthless and would never amount to anything in life. He had chased the petitioner out of the house and down the street, had been seen dragging the petitioner out of the house by the neck, punched him, threw beer bottles at him, threw his stereo down a flight of stairs, threw him against the wall, kicked him, and late one night urinated in the petitioner's bedroom closet and then awakened the petitioner and forced him to clean up the mess. He was equally abusive to the petitioner's mother, hitting her, throwing her to the ground and swearing at her in front of the children.

Mr. Adams always was armed with knives, which he carried in his pocket along with a sharpening stone. He kept numerous guns, rifles, ammunition, knives, cans of combustible fuel and a bow and arrow readily accessible. He enjoyed trapping and killing small animals, which he skinned and kept their pelts hanging in the basement. He had shot a squirrel with a revolver from the bathroom window, in the petitioner's presence when the petitioner was very young, had forced the petitioner to accompany him on one occasion while he pursued with a gun a

person he believed had stolen the petitioner's bicycle, and just a week before the events here had hit the petitioner across the head with a BB gun and chased him down the street with it.

Although he subjected his son to a constant stream of physical and emotional abuse, Mr. Adams otherwise took no interest in the boy. He never visited his school and only once attended a sporting event in which his son participated.

Not surprisingly, the petitioner reached his teenage years a troubled youngster. He was a disciplinary problem in school and often cut classes. On the morning of October 12, 1993, he was informed by the assistant principal of the high school that he would be suspended for five days because of absenteeism and that his parents would be notified. Tragically, it was the father who was called, at his place of employment.

After school that day, the petitioner and his girlfriend took the school bus to his house, where they fell asleep lying on his bed watching television. They were awakened by the petitioner's father bursting through the bedroom door and yelling at the petitioner about the suspension. The father swore at the petitioner, calling him names and telling him he was "no good." He left the room and the petitioner followed him. In the hallway just outside the bedroom, the petitioner asked his father not to come into the bedroom without knocking. Enraged, Mr. Adams grabbed the petitioner and threw him against the bathroom door. He put his hands around the petitioner's neck and began to choke him while yelling at him and calling him names. The choking was so severe

that the petitioner could not breath. Eventually, he released the petitioner and the petitioner returned to the bedroom where his girlfriend observed that he was bleeding from the mouth and had red marks around his neck.

After a few minutes, the petitioner got up off the bed for a second time, put his pocket knife into his pocket and, thinking that his father was calling him, walked into the living room to speak again with his father. His father was pacing and when the petitioner entered the room grabbed him again by the neck. The petitioner pulled the knife from his pocket. His father released his grip momentarily, then again grabbed him by the throat and, shouting profanities, threw him against the wall. The petitioner's vision blurred and he again was having trouble breathing. He attempted to stab his father in the arm to force him to release his grip. There was a struggle. The father was stabbed several times. The petitioner ran out the front door and his girlfriend followed.

The petitioner was covered with blood and holding the knife in his hand, in a daze. He was bleeding from the mouth, had more profound red marks on his neck than before, and had a damaged tooth. They walked together through the woods behind the house to a convenience store, discarding the knife on the way, and from there called 911. They returned to the petitioner's house and called 911 a second time. The police arrived and took the petitioner into custody. He gave a full statement and showed the police where he had thrown the knife.

The defense was self defense. However, the court, over objection, charged the jury as follows:

"[T]here are circumstances under which the use of physical force and deadly physical force are not justified. A person may not use deadly physical force upon another when he knows he can avoid it by [sic] complete safety by retreating. In this regard, consider whether the defendant knew he could leave and safely withdraw from the threat, or whether safe retreat was impossible from his victim, and whether he was aware of that situation. A defendant must get away from there before standing his ground and returning deadly force with force, assuming, however, he knows it is safe to do so.

"Now there is an exception to the duty to retreat. Our law says that a person is not required to retreat if he is in his dwelling and he was not the initial aggressor. However, if both antagonists have the same dwelling, the defendant does have a duty to retreat, since the law discourages familial high noon showdowns. So the question arises, was this the victim's dwelling? Dwelling is defined as a building which is usually occupied by a person lodging therein at night whether or not a person is actually present. A resident is one who resides in a place, one who dwells in a place for a period of some duration. The definition of dwelling requires usual customary or routine occupancy. In short, in the words of our Supreme Court, occupation for some period of duration. Let me repeat that. Occupation for some period of duration.

"In determining whether 41 Maher Avenue was the victim's dwelling, you should look at whether he occupied this house for some period of duration at or about the time in question. Under our law a person may have more than one dwelling, for instance, a house and a beach house. There was testimony in this case that the victim

was married to Jane Adams, that he owned the house, that he had the key to the house, that because of difficulties they agreed that he would not stay there over the long weekends of Friday, Saturday, Sunday, and Monday, but that he would stay there Tuesday, Wednesday, Thursday, or would be able to if he wished. Mrs. Adams testified that she did not always know, however, when he was coming or not coming. There is evidence that the incident in question occurred on October 12, 1993, which was I am informed a Tuesday, which was one of the victim's agreed days at the house.

"You should decide whether the victim was in his dwelling when he was stabbed. If you find that he was, the defendant who had the same dwelling, had a duty to retreat if he knew he could do so with complete safety. If, however, you find that the victim was not in his dwelling when he was stabbed, the defendant who was in his dwelling, has no duty to retreat if he was not the initial aggressor. This is a question of fact for the jury."

When the court convened the following morning, the jury sent a note requesting "a detailed explanation of self defense." The note added: "Please, we need this defense. We've got to hear it." (May 10, 1996, trial transcript, p. 2.) The court then re-read its instruction from the previous day.

Within two hours, the jury returned a verdict of guilty on the second count, alleging that the death resulted from reckless conduct creating a grave risk of death. The now 18-year-old petitioner was sentenced to

7-1/2 years of imprisonment, to be followed by a period of probation.

REASONS FOR GRANTING THE WRIT

THE COURT'S CHARGE ON SELF-DEFENSE VIOLATED THE PETITIONER'S DUE PROCESS RIGHT TO TRIAL BEFORE A JURY PROPERLY INSTRUCTED ON THE THEORY OF DEFENSE SUPPORTED BY THE EVIDENCE IN THIS CASE.

If the defendant in a criminal trial asserts a recognized legal defense and the evidence indicates the availability of that defense, such a charge is obligatory and the defendant is entitled, as a matter of law, to a theory of defense instruction. The defendant's right to such an instruction is founded on the principles of due process. Self-defense is a recognized legal defense. *Washington v. Texas*, 388 U.S. 14, 19 (1967); *State v. Carter*, 232 Conn. 537, 554; 656 A.2d 657 (1995). The evidence in this case unquestionably required a charge on self defense.

"The class of crimes in prevention of which a man may, if necessary, exercise his natural right to repel force by force to the taking of the life of the aggressor, are felonies which are committed by violence and surprise; such as murder, robbery, burglary, arson, breaking a house in the day time with intent to rob, sodomy and rape. Blackstone says: 'Such homicide as is committed for the prevention of any forcible and atrocious crime is justifiable by the law of nature; and also by the law of England, as it stood as early as the time of Bracton. . . . ' " *State v. Moore*, 31 Conn. 479, 483 (1863).

Due process of law under the Fourteenth Amendment mandates that the state has the burden of disproving beyond a reasonable doubt the existence of self defense. *E.g., Government of the Virgin Islands v. Smith*, 949 F.2d 677 (3d Cir. 1991); *Smart v. Leeke*, 856 F.2d 609 (4th Cir. 1988); *Tennon v. Ricketts*, 642 F.2d 161 (5th Cir. 1981); *Holloway v. McElroy*, 632 F.2d 605 (5th Cir. 1980); *Isaac v. Engle*, 646 F.2d 1129 (6th Cir. 1980).

The court denied the petitioner due process of law in its instructions on the issue of whether the petitioner's father "dwelled" in the house where he was killed.

For purposes of the "duty to retreat" in a self-defense case, the word "dwelling" is defined by General Statutes section 53a-100(a)(2). Conn. Gen. Stat. section 53a-19(b). The word "dwelling" "means a building which is usually occupied by a person lodging therein at night, whether or not a person is actually present". There is no way that the agreed-upon facts of this case could support a finding that the deceased here occupied the house of his demise as his "dwelling" under this definition. Yet the court not only submitted that issue to the jury; it actually provided the jury with instructions which, as defense counsel protested in his exception to that part of the charge, "directed the jury in effect to find that Mr. Adams, Sr. was a dweller at the residence at the time in question."

Yet in its marshalling of the evidence, and throughout its charge, the court pressed the jury in every way it could short of an explicit direction, to find that the deceased occupied the petitioner's house as his "dwelling". When the court's marshalling of the evidence is contrasted to the evidence actually before the jury, it is

readily apparent that the court was advising the jury of its own opinion on the issue.

Reading this portion of the jury charge, it is difficult even for an experienced lawyer who knows the participants to escape the sense that the judge in this case really thought the defendant should be convicted. If a lawyer has that problem – trial counsel told the court he considered the charge on this issue the equivalent of a directed verdict for the state – how impossible would such a task have been for a lay jury? As this court has observed, it is virtually a truism that the trial judge's opinion of the case is "necessarily and properly of great weight and his lightest word of intimation is received with deference, and may prove controlling." *Quercia v. United States*, 289 U.S. 466, 470 (1933).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

JOHN R. WILLIAMS
51 Elm Street
New Haven, CT 06510
(203) 562-9931

Attorney for Petitioner

STATE OF CONNECTICUT *v.* JOHN C. ADAMS, JR.
(SC 16112)

Borden, Norcott, Katz, Palmer and Vertefeuille, Js.

Argued March 23 – officially released April 25, 2000

Procedural History

Substitute information charging the defendant with two counts of the crime of manslaughter in the first degree, brought to the Superior Court in the judicial district of New Haven and tried to the jury before *Freedman, J.;* verdict and judgment of guilty of one count of manslaughter in the first degree, from which the defendant appealed to the Appellate Court, *Spear, Hennessy* and *Daly, Js.*, which affirmed the judgment of the trial court, and the defendant, on the granting of certification, appealed to this court. *Affirmed.*

John R. Williams, for the appellant (defendant).

Michael E. O'Hare, assistant state's attorney, with whom, on the brief, were *Michael Dearington,* state's attorney, and *David P. Gold,* former assistant state's attorney, for the appellee (state).

Opinion

PER CURIAM. The defendant, John C. Adams, Jr., was found guilty by a jury of manslaughter in the first degree in violation of General Statutes § 53a-55 (a)(3),[1]

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[1] General Statutes § 53a-55 (a) provides: "A person is guilty of manslaughter in the first degree when: (1) With intent to cause serious physical injury to another person, he causes the death of such person or of a third person; or (2) with intent to cause the death of another person, he causes the death of such person or of a third person under circumstances which do not

and the trial court rendered judgment accordingly. Upon his appeal to the Appellate Court, that court rejected his claims that the trial court had improperly: (1) instructed the jury on his claim of self-defense; (2) denied his motion for a mistrial based on prosecutorial misconduct; (3) excluded certain of his statements to the police as hearsay; and (4) concluded that there was sufficient evidence to support the conviction. *State v. Adams*, 52 Conn.App. 643, 648-61, 727 A.2d 780 (1999). Accordingly, the Appellate Court affirmed the judgment of conviction. Id., 661.

We granted certification to appeal, limited to the following issue: "Under the circumstances of this case, did the Appellate Court improperly conclude that the trial court properly instructed the jury on the defendant's claim of self-defense?" *State v. Adams*, 249 Conn. 907, 733 A.2d 226 (1999). This certified appeal followed.

Having reviewed the briefs, the record and the arguments of the parties, we conclude that the judgment of the Appellate Court should be affirmed. In its thorough and thoughtful opinion, the Appellate Court properly

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constitute murder because he committed the proscribed act or acts under the influence of extreme emotional disturbance, as provided in subsection (a) of section 53a-54a, except that the fact that homicide was committed under the influence of extreme emotional disturbance constitutes a mitigating circumstance reducing murder to manslaughter in the first degree and need not be proved in any prosecution initiated under this subsection; or (3) under circumstances evincing an extreme indifference to human life, he recklessly engages in conduct which creates a grave risk of death to another person, and thereby causes the death of another person."

resolved the issue on which we granted certification. See *State v. Adams*, supra, 52 Conn. App. 649-52.

The judgment of the Appellate Court is affirmed.

STATE OF CONNECTICUT *v.* JOHN C. ADAMS, JR.
(AC 16738)

Spear, Hennessy and Daly, Js.

Syllabus

Convicted of the crime of manslaughter in the first degree in connection with the stabbing death of his father, the defendant appealed to this court claiming, inter alia, that the trial court improperly instructed the jury on his claim of self-defense. *Held:*

1. Contrary to the defendant's claim, the trial court did not improperly marshall the evidence in favor of the state or create a one-sided rendition of the case that was unfair to the defendant.

2. In its instruction on self-defense and the duty to retreat, the trial court properly defined the term "dwelling."

3. The trial court properly instructed the jury on the subjective-objective test of self-defense; that court clearly instructed the jury to determine first whether the defendant believed that he was faced with the imminent use of deadly force before he used such force and then to determine whether that belief was reasonable.

4. The trial court did not abuse its discretion in denying the defendant's request for a mistrial after the prosecutor asked him in the presence of the jury whether he had ever been arrested and whether he had told his mother on the morning of the incident that he planned to take a knife to school; the defendant failed to meet his burden of demonstrating that he was prejudiced by either question.

5. The trial court did not abuse its discretion in excluding, as hearsay, certain statements that the defendant made to the police while he was in custody; those

statements did not fall within the state of mind exception to the hearsay rule and they were not sufficiently reliable and trustworthy to be admissible under the residual hearsay exception.

6. The evidence presented was sufficient to support the defendant's conviction; the jury could reasonably have determined that the defendant engaged in conduct that created a grave risk of death under circumstances evincing an extreme indifference to human life, it could have rejected his claim of self-defense, and it could properly have concluded that the defendant had a duty to retreat and could have done so with complete safety.

Argued January 10 – officially released April 13, 1999

Procedural History

Substitute information charging the defendant with two counts of the crime of manslaughter in the first degree, brought to the Superior Court in the judicial district of New Haven and tried to the jury before *Freedman, J.*; verdict and judgment of guilty of one count of manslaughter in the first degree, from which the defendant appealed to this court. *Affirmed.*

Suzanne L. McAlpine, with whom, on the brief, was *Nicole M. Fournier;* for the appellant (defendant).

Michael E. O'Hare, assistant state's attorney, with whom, on the brief, were *Michael Dearington,* state's attorney, and *David P. Gold,* assistant state's attorney, for the appellee (state).

Opinion

DALY, J. The defendant, John C. Adams, Jr., appeals from the judgment of conviction, following a jury trial, of manslaughter in the first degree in violation of General

Statutes § 53a-55 (a)(3).[1] The defendant claims that the trial court improperly (1) instructed the jury on his claim of self-defense, (2) denied his motion for a mistrial based on prosecutorial misconduct, (3) excluded as hearsay his statements to the police following his arrest and (4) concluded that the evidence was sufficient to support his conviction. We affirm the judgment of the trial court.

The jury reasonably could have found the following facts. On the morning of October 12, 1993, the defendant, a sixteen year old high school student, was suspended from school for excessive absences. That afternoon, the defendant went to his parents' house at 41 Maher Avenue in Hamden with his girlfriend, Teresa Schulz, where they fell asleep on the defendant's bed.

Sometime thereafter, the victim, John C. Adams, Sr., burst through the defendant's bedroom door, yelling at the defendant for being suspended. The victim left the defendant's bedroom without touching him. The defendant followed the victim to tell him not to enter his room without knocking. In response, the victim yelled obscenities at the defendant, grabbed him by the neck and threw him against the bathroom door.

The defendant returned to his bedroom where Schulz noticed red marks on his neck and blood coming from his mouth. The defendant picked up a knife from his dresser

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[1] General Statutes § 53a-55 provides in relevant part: "(a) A person is guilty of manslaughter in the first degree when . . . (3) under circumstances evincing an extreme indifference to human life, he recklessly engages in conduct which creates a grave risk of death to another person, and thereby causes the death of another person. . . ."

and put it in his back pocket. The defendant then left his bedroom and became involved in an altercation with the victim in which the defendant stabbed the victim sixteen times. Five of the stab wounds penetrated the victim's chest, causing his death.

After stabbing the victim, the defendant ran outside to a nearby baseball field. Schulz then went outside to find him. After Schulz found the defendant, they went to a nearby convenience store to call the police. On the way to the store, the defendant threw his knife into a wooded area. The defendant and Schulz returned to the defendant's house and then took the police to where the defendant had thrown the knife. The defendant was subsequently arrested and convicted. This appeal followed.

I

The defendant first claims that the trial court improperly instructed the jury on his claim of self-defense. Specifically, the defendant claims that the trial court misled the jury by (1) marshalling the evidence in favor of the state, (2) improperly instructing the jury on the definition of the dwelling exception to his duty to retreat before using deadly force and (3) improperly instructing the jury on the "subjective-objective test" of self-defense.

Additional facts are necessary to our resolution of these claims. The trial court instructed the jury on the defendant's duty to retreat before using deadly force in self-defense. The trial court then instructed the jury that "there is an exception to the duty to retreat. Our law says that a person is not required to retreat if he is in his

dwelling and he was not the initial aggressor. However, if both antagonists have the same dwelling, the defendant does have a duty to retreat. . . . Dwelling is defined as a building which is usually occupied by a person lodging therein at night, whether or not a person is actually present. A resident is one who resides in a place, one who dwells in a place for a period of some duration. The definition of dwelling requires usual customary or routine occupancy. In short, in the words of our Supreme Court, occupation for some period of duration."

"In determining whether 41 Maher Avenue was the victim's dwelling, you should look at whether he occupied this house for some period of duration at or about the time in question. . . . There was testimony in this case that the victim was married to Jane Adams, that he owned the house, that he had the key to the house, that because of difficulties they agreed that he would not stay there over the long weekends of Friday, Saturday, Sunday and Monday, but that he would stay there Tuesday, Wednesday, Thursday or would be able to if he wished. Mrs. Adams testified that she did not always know, however, when he was coming or not coming. There is evidence that the incident in question occurred on October 12, 1993, which was, I am informed, a Tuesday, which was one of the victim's agreed days at the house."

"Our standard of review in cases when the defendant claims that the instructions violate constitutional due process protections is whether the jury instructions were so deficient that it was reasonably possible the jury was misled." *State v. Patterson*, 35 Conn. App. 405, 416, 646 A.2d 258, cert. denied, 231 Conn. 930, 649 A.2d 254 (1994). "To pass constitutional muster, jury instructions must be

correct in law, adapted to the issues in the case and sufficient to guide the jury in arriving at a verdict." Id., 417.

A

The defendant claims that the trial court misled the jury by marshalling "the evidence solely in favor of the state and essentially taking away from the jury the factual question of whether 41 Maher Avenue was, in fact, [the victim's] dwelling."

Additional facts are necessary to our resolution of this claim. After the trial court instructed the jury on the dwelling exception to the duty to retreat, the defendant objected to the instruction, claiming that the trial court marshalled the evidence in favor of the state. The next day, the jury, after beginning its deliberations, requested a further "detailed explanation of self-defense." The trial court granted the jury's request and provided essentially the same charge, but did not marshall the evidence on the issue of whether 41 Maher Avenue was the victim's dwelling. The trial court then instructed the jury to disregard any facts that it had provided in its initial charge and instructed the jury that only the jury's recollection of the facts mattered when deliberating.

General Statutes § 53a-19 (a) provides that a person is justified in using deadly physical force upon another person to defend himself when the actor reasonably believes that another person is "(1) using or about to use deadly physical force, or (2) inflicting or about to inflict great bodily harm." Nonetheless, "a person is not justified in using deadly physical force upon another person

if he knows that he can avoid the necessity of using such force with complete safety (1) by retreating, except that the actor shall not be required to retreat if he is in his dwelling. . . . " General Statutes § 53a-19 (b). The dwelling exception does not apply, however, if the actor is "threatened by another person who also dwells in the same place." *State v. Shaw*, 185 Conn. 372, 379, 441 A.2d 561 (1981), cert. denied, 454 U.S. 1155, 102 S.Ct. 1027, 71 L. Ed. 2d 312 (1982).

"A trial court has broad discretion to comment on the evidence adduced in a criminal trial. . . . A trial court often has not only the right, but also the duty to comment on the evidence." (Citations omitted; internal quotation marks omitted.) *State v. Hernandez*, 218 Conn. 458, 461-62, 590 A.2d 112 (1991). "The purpose of marshalling the evidence, a more elaborate manner of judicial commentary, is to provide a fair summary of the evidence, and nothing more; to attain that purpose, the [trial] judge must show strict impartiality. . . . To avoid the danger of improper influence on the jury, a recitation of the evidence should not be so drawn as to direct the attention of the jury too prominently to the facts in the testimony on one side of the case, while sinking out of view, or passing lightly over, portions of the testimony on the other side, which deserve equal attention." (Citations omitted; internal quotation marks omitted.) Id., 462.

We conclude that the trial court properly marshalled the evidence and did not, contrary to the defendant's claim, "create a one-sided rendition of the case that was prejudicially unfair to the defendant." For example, even though the trial court said that the state presented evidence that the victim dwelled at 41 Maher Avenue, it then

said that the defendant provided evidence that the victim's wife did not always know when the victim would be staying at the house. Moreover, the trial court instructed the jury that it was to disregard the trial court's recitation of the facts and was to rely solely on its own recollection of the facts. "The jury is presumed, in the absence of a fair indication to the contrary, to have followed the court's instructions." *State v. Parris*, 219 Conn. 283, 294, 592 A.2d 943 (1991).

B

The defendant claims that the trial court, in its charge, improperly defined dwelling and, therefore, misled the jury. We are not persuaded.[2]

General Statutes § 53a-100 (a)(2) defines "dwelling" as "a building which is usually occupied by a person lodging therein at night, whether or not a person is actually present. . . . " "[Section] 53a-100 contemplates a duration element by requiring usual inhabitation at night. Usual in this context obviously means customary or routine occupancy; Webster, New Collegiate Dictionary (1974); in short, occupation for some period of duration." (Internal quotation marks omitted.) *State v. Bailey*, 209 Conn. 322, 343, 551 A.2d 1206 (1988).

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[2] The state claims that the defendant did not properly preserve his claims at trial. The defendant, however, filed a supplemental request to charge on the dwelling exception to the duty to retreat rule. Accordingly, we conclude that the defendant properly preserved his claims pursuant to Practice Book § 60-5. See *State v. Ryan*, 18 Conn. App. 602, 605, 559 A.2d 1156 (1989).

The defendant claims that the trial court, by instructing the jury that when determining whether 41 Maher Avenue was the victim's dwelling it must determine whether the victim occupied the house "at or about the time in question," materially altered the definition and also "shortened the period of time contemplated by the court in *Bailey*." We conclude that the trial court's additional remarks neither materially altered the statutory definition of dwelling nor reduced the period of duration required by *Bailey*. Instead, the trial court merely instructed the jury to focus on whether the victim dwelled at 41 Maher Avenue at the time of the incident. Indeed, the defendant's claim that the additional comments "shortened the period of time" contemplated by the *Bailey* court is unpersuasive because that court never suggested a period of time. Accordingly, we conclude that the trial court did not mislead the jury.

C

The defendant claims that the trial court misled the jury by improperly instructing it on the subjective-objective test of self-defense. We disagree.

The jury, when analyzing whether the defendant reasonably believed that deadly force was necessary to repel the victim's alleged attack, must apply a subjective-objective test. *State v. Prioleau*, 235 Conn. 274, 286, 664 A.2d 743 (1995). "The subjective-objective inquiry into the defendant's belief regarding the necessary degree of force requires that the jury make two separate affirmative determinations in order for the defendant's claim of self-defense to succeed. First, the jury must determine

whether, on the basis of all of the evidence presented, the defendant in fact had believed that he had needed to use deadly physical force, as opposed to some lesser degree of force, in order to repel the victim's alleged attack. . . . The jury's initial determination, therefore, requires the jury to assess the veracity of witnesses, often including the defendant, and to determine whether the defendant's account of his belief in the necessity to use deadly force at the time of the confrontation is in fact credible. This probe into the defendant's actual state of mind clearly demonstrates the function of the jury in [its] evaluation of the self-defense claim. . . .

"If the jury determines that the defendant had not believed that he had needed to employ deadly physical force to repel the victim's attack, the jury's inquiry ends, and the defendant's self-defense claim must fail. If, however, the jury determines that the defendant in fact had believed that the use of deadly force was necessary, the jury must make a further determination as to whether *that belief* was reasonable, from the perspective of a reasonable person in the defendant's circumstances. . . . Thus, if a jury determines that the defendant's honest belief that he had needed to use deadly force, instead of some lesser degree of force, was not a reasonable belief, the defendant is not entitled to the protection of § 53a-19." (Citation omitted; emphasis in original; internal quotation marks omitted.) *State v. Scarpiello*, 40 Conn. App. 189, 206-207, 670 A.2d 856, cert. denied, 236 Conn. 921, 674 A.2d 1327 (1996).

The defendant claims that the trial court's instruction "failed to adequately inform [the jurors] that their initial duty was to determine what the defendant actually

believed was the amount of force necessary to repel the victim." We conclude, after examining the trial court's charge as a whole, that the defendant's claim must fail.

The defendant relies on *State v. Walton*, 41 Conn. App. 831, 678 A.2d 986 (1996), to support his claim that the trial court's instruction was improper. In *Walton*, this court held as improper a trial court's instruction that did not set forth a subjective-objective test of self-defense, but rather set forth a purely objective test. Conversely, the trial court here, in each of its self-defense instructions, clearly instructed the jury first to determine whether the defendant believed that he was faced with the imminent use of physical force upon him before he used physical force and then to determine whether his belief was reasonable. The trial court then informed the jury that the inquiry is a subjective-objective test and that it must "view the situation first from the subjective perspective of the defendant, but the defendant's belief then must be found to be objectively reasonable, not unreasonable or irrational." Finally, the trial court, in its second jury charge, clearly instructed the jury to apply a subjective-objective test when determining whether the defendant acted in self-defense.

The defendant further claims that the trial court diminished the importance of the subjective portion of the test by using the word "reasonable" eleven times in its charge. The defendant, however, fails to provide, nor can we find, any authority supporting his claim. Accordingly, we conclude that the trial court properly instructed the jury on the subjective-objective test.

II

The defendant next claims that the trial court improperly denied his motion for a mistrial based on the prosecutor's misconduct. Specifically, the defendant claims that the prosecutor engaged in misconduct that "systematically eroded" the defendant's credibility by asking the defendant on cross-examination, in the presence of the jury, (1) whether he was ever arrested and (2) whether he told his mother on the morning of the incident that he was "going to be taking the knife to school." We disagree.

A

Additional facts are necessary to our resolution of this claim. The prosecutor, during his cross-examination of the defendant, asked him whether "the police treat[ed][him] nice" after he was arrested. The defendant responded that he had "never been in a position like that to tell you differently," to which the prosecutor responded, "well now, you've been arrested before, by the police. . . . " The defendant immediately objected, asked that the jury be excused and moved for a mistrial on the ground that the prosecutor had "tainted [the defendant] in front of the jury." The prosecutor, in response, argued that the defendant was questioned by the police before this incident, even though the questioning never led to the defendant's arrest. The trial court, after the prosecutor conducted a voir dire of the defendant, overruled the defendant's motion for mistrial. Nonetheless, the trial court, when the jury reconvened, instructed the jury to disregard the prosecutor's question.

The defendant claims that the prosecutor's question "permanently tainted the defendant in front of the jury." We disagree.

As a general rule, the decision whether to declare a mistrial is committed to the sound discretion of the trial court. *State v. Wooten*, 227 Conn. 677, 693-94, 631 A.2d 271 (1993). "[A] mistrial should be granted only as a result of some occurrence upon the trial of such a character that it is apparent to the court that because of it a party cannot have a fair trial . . . and the whole proceedings are vitiated. . . . [Id.] If curative inaction can obviate the prejudice, the drastic remedy of a mistrial should be avoided. . . . [Id.] On appeal, we hesitate to disturb a decision not to declare a mistrial. The trial judge is the arbiter of the many circumstances which may arise during the trial in which his function is to assure a fair and just outcome. . . . The trial court is better positioned than we are to evaluate in the first instance whether a certain occurrence is prejudicial to the defendant and, if so, what remedy is necessary to cure that prejudice." (Citations omitted; internal quotation marks omitted.) *State v. Day*, 233 Conn. 813, 836-37, 661 A.2d 539 (1995).

"[T]he touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, and not the culpability of the prosecutor. . . . The issue is whether the prosecutor's conduct so infected the trial with unfairness as to make the resulting conviction a denial of due process. . . . We must, therefore, determine whether the [actions] of the prosecutor, in light of all the circumstances . . . were so egregious and so damaging to the defendant that they deprived him of a fair trial." (Citations omitted; internal quotation marks omitted.)

State v. Sivri, 46 Conn. App. 578, 590-91, 700 A.2d 96, cert. denied, 243 Conn. 938, 702 A.2d 644 (1997). In doing so, we have focused on several factors, including "the extent to which the misconduct was invited by defense conduct or argument; *State v. Falcone*, 191 Conn. 12, 23, 463 A.2d 558 (1983); the severity of the misconduct; see *United States v. Modica*, 663 F.2d 1173, 1181 (2d Cir. 1981); the frequency of the misconduct; *State v. Couture*, 194 Conn. 530, 562-63, 482 A.2d 300 (1984), cert. denied, 469 U.S. 1192, 105 S.Ct. 967, 83 L. Ed. 2d 971 (1985); see *State v. Doehrer*, [200 Conn. 642, 654, 513 A.2d 58 (1986)]; *State v. Palmer*, [196 Conn. 157, 163, 491 A.2d 1075 (1985)]; the centrality of the misconduct to the critical issues in the case; *Hawthorne v. United States*, 476 A.2d 164, 172 (D.C. App. 1984); the strength of the curative measures adopted; *United States v. Modica*, supra, 1181; *Harris v. United States*, 402 F.2d 656, 657 n.1 (D.C. Cir. 1968); *State v. Doehrer*, supra, 654; and the strength of the state's case. See *United States v. Modica*, supra, 1181; *State v. Couture*, supra, 564; see also *State v. Glenn*, 194 Conn. 483, 492, 481 A.2d 741 (1984)." *State v. Chasse*, 51 Conn. App. 345, 355-56, 721 A.2d 1212 (1998), cert. denied, 247 Conn. 960, 723 A.2d 816 (1999).

We conclude that the defendant has failed to meet his burden of demonstrating "that the [prosecutor's] remarks were so prejudicial that he was deprived of a fair trial and the entire proceedings were tainted." *State v. Robinson*, 227 Conn. 711, 746, 631 A.2d 288 (1993). The prosecutor's question dealt with a collateral issue to the case. Indeed, although the trial court noted its disapproval of the question, it also stated that the question was a "major

transgression" from the critical issues of the case. Moreover, the trial court remedied any prejudice that the defendant may have suffered by issuing a curative instruction to the jury. The defendant did not claim at trial, nor has he claimed on appeal, that the trial court's curative instruction given to the jury was defective. "We have often held that a prompt cautionary instruction to the jury regarding improper prosecutorial remarks obviates any possible harm to the defendant." *State v. Sherman*, 38 Conn. App. 371, 386, 662 A.2d 767, cert. denied, 235 Conn. 905, 665 A.2d 905 (1995).

B

The defendant also claims that the prosecutor engaged in misconduct by asking the defendant whether he told his mother that he was going to take the knife to school that day. After the prosecutor resumed his cross-examination of the defendant, he asked the defendant if he told his mother that he was "going to be taking the knife to school with [him] that day." The defendant immediately objected and the trial court excused the jury. The defendant argued that the question lacked a foundation in the evidence. The prosecutor argued, however, that the defendant had told the defendant's expert witness, C. Scott Grove, a psychiatrist who had interviewed and prepared a report on the defendant, that he took the knife to school with him that day and that Grove transcribed the defendant's statement in a report.

The defendant then testified that he never told Grove that he took a knife to school that day. Defense counsel then requested that the prosecutor find in Grove's report

the defendant's statement that he took a knife to school that day. The prosecutor, however, was unable to find the defendant's statement, so he withdrew the question. The trial court, after the jury returned to the courtroom, instructed the jury that it must disregard the question.

The defendant claims that the prosecutor engaged in misconduct by implying, through the improper question, that the stabbings were premeditated, thus prejudicing the defendant by weakening his self-defense claim that hinged solely on his credibility. The defendant further claims that the prosecutor "systematically eroded [the defendant's] credibility in front of the jury" by asking the two inappropriate questions.

"A question is within the scope of the direct examination if it is designed to rebut, impeach, modify or explain any of the defendant's direct testimony." *State v. Marsala*, 44 Conn. App. 84, 91, 688 A.2d 336, cert. denied, 240 Conn. 912, 690 A.2d 400 (1997). " 'A good faith basis on the part of examining counsel as to the truth of the matter contained in questions propounded to a witness on cross-examination is required.' " *State v. Beliveau*, 237 Conn. 576, 586, 678 A.2d 924 (1996).

There was evidence that the defendant frequently carried a knife, and Schulz testified that the defendant usually carried a knife when they went to the woods together. After examining the prosecutor's question in light of the entire trial, we conclude that the question did not systematically erode the defendant's credibility in front of the jury.

III

The defendant next claims that the trial court abused its discretion by excluding as hearsay statements that the defendant made to the police while he was in custody. Specifically, the defendant claims that the trial court improperly excluded his statements that should have been admitted under either the state of mind or the residual hearsay exception.

Additional facts are necessary to our resolution of this claim. After the Hamden police arrested the defendant, they interviewed him twice. During each interview, the defendant confessed that he stabbed the victim in self-defense. The trial court granted the state's motion in limine precluding the defendant from offering these statements into evidence. When the defendant attempted to offer his statements into evidence, the trial court ruled that they were inadmissible hearsay.

" 'On appeal, the trial court's rulings on the admissibility of evidence are accorded great deference. . . . Rulings on such matters will be disturbed only upon a showing of clear abuse of discretion.' " (Citations omitted.) *State v. Jurgensen*, 42 Conn. App. 751, 754, 681 A.2d 981, cert. denied, 239 Conn. 931, 683 A.2d 398 (1996). Hearsay is an out-of-court statement that is offered to establish the truth of the matters contained therein. *State v. Sharpe*, 195 Conn. 651, 661, 491 A.2d 345 (1985).

The defendant claims that the trial court abused its discretion by excluding his statements because the statements should have been admitted under the state of mind exception to the hearsay rule in order to demonstrate that

he stabbed the victim in self-defense. "It is well established that [a]n out-of-court statement is not hearsay . . . if it is offered to illustrate circumstantially the declarant's then present state of mind, rather than to prove the truth of the matter asserted." (Internal quotation marks omitted.) *Eisenbach v. Downey*, 45 Conn. App. 165, 180, 694 A.2d 1376, cert. denied, 241 Conn. 926, 696 A.2d 1264 (1997). However, "[s]tatements by an accused '*after the act*, stating the *past intent or motive* at the time of the act' are inadmissible under the state of mind exception to the hearsay rule." (Emphasis in original.) *State v. Freeney*, 228 Conn. 582, 595, 637 A.2d 1088 (1994). We conclude that in the present case the trial court did not abuse its discretion by excluding the defendant's postarrest statements as inadmissible hearsay not falling within the state of mind exception.

The defendant also claims that the trial court abused its discretion by not admitting the defendant's hearsay statements under the residual, or catch-all, exception to the hearsay rule. A court may admit hearsay under the residual exception if (1) there was a reasonable necessity for the admission of the statement, and (2) the statement was supported by the equivalent guarantees of reliability and trustworthiness essential to other evidence admitted under the traditional hearsay exceptions. *State v. Sharpe*, supra 195 Conn. 664.

We conclude that the trial court did not abuse its discretion by excluding the defendant's postarrest statements under the residual hearsay exception, as there was not a reasonable necessity for the admission of the statements. "[T]he necessity requirement is met when, unless the hearsay statement is admitted, the facts it contains

may be lost, either because the declarant is dead or otherwise unavailable, or because the assertion is of such a nature that evidence of the same value cannot be obtained from the same or other sources." Id., 665. Here, the defendant was available to testify. We conclude, therefore, that the necessity requirement of *Sharpe* was not met in this case. Accordingly, the trial court properly excluded the defendant's statements under the residual hearsay exception.

Even if we were to conclude that the defendant's statements were reasonably necessary, the statements were not sufficiently reliable or trustworthy, as *Sharpe* requires. The record reveals that the defendant, after stabbing the victim, understood the nature of his actions and had enough time to formulate a self-defense claim. This is not a situation where "the circumstances are such that a sincere and accurate statement would naturally be uttered, and no plan of falsification be formed." Id., 665. If the trial court had admitted the defendant's unreliable and untrustworthy statements, the state would have been unable to cross-examine the defendant as to those statements if the defendant chose not to testify. Accordingly, we conclude that the defendant's hearsay statement is not sufficiently reliable and trustworthy to be admitted under the residual hearsay exception.

IV

The defendant's final claim is that the evidence was insufficient to support his conviction. Specifically, the defendant claims that the state failed to present evidence from which a jury could conclude beyond a reasonable

doubt that the defendant was guilty of manslaughter in the first degree. We disagree.

"When reviewing sufficiency of the evidence claims, we impose a two part analysis. First, we construe the evidence in the light most favorable to sustaining the verdict. . . . Second, we determine whether, from that evidence and all reasonable inferences that it yields, a trier of fact reasonably could have concluded that the defendant was guilty beyond a reasonable doubt." *State v. Teti*, 50 Conn. App. 34, 38, 716 A.2d 931, cert. denied, 247 Conn. 921, 722 A.2d 812 (1998).

The defendant was charged with manslaughter in the first degree. The state, to establish a violation of manslaughter in the first degree, must prove that the accused, "under circumstances evincing an extreme indifference to human life . . . recklessly engages in conduct which creates a grave risk of death to another person, and thereby causes the death of another person." General Statutes § 53a-55 (a)(3).

The defendant claims that the state's evidence failed (1) to prove that "the defendant acted with intent to cause serious physical injury to another person or that he acted with reckless disregard for human life," (2) to disprove the defendant's assertion of self-defense and (3) to "prove that the defendant had a duty to retreat or that he knew he could retreat with complete safety." The defendant's contentions are without merit.

First, the evidence was sufficient to prove that the defendant was guilty of manslaughter in the first degree. The defendant does not dispute that he stabbed the victim sixteen times in causing the victim's death. Further,

the state presented evidence that the defendant was angry and started an altercation with the victim. Accordingly, we conclude that the evidence was sufficient for the jury to find that the defendant recklessly engaged in conduct that created a grave risk of death under circumstances evincing an extreme indifference to human life.

Second, the jury reasonably could have rejected the defendant's claim of self-defense. The evidence presented was such that the jury was free to disbelieve the defendant's claim of self-defense and to conclude beyond a reasonable doubt that he could not reasonably have believed that he was faced with the imminent use of physical force by the victim or that the degree of physical force that he used against the victim was necessary to defend himself. See *State v. Ash*, 33 Conn. App. 782, 789, 638 A.2d 633, rev'd on other grounds, 231 Conn. 484, 651 A.2d 247 (1994). The jury, from the evidence presented, reasonably could have concluded that the defendant was the initial aggressor of the attack and, therefore, did not act in self-defense. Further the jury had evidence before it indicating that the defendant did not believe that the victim was using or about to use deadly physical force or inflict great bodily harm. Indeed, the evidence indicated that the victim never attempted to use deadly physical force on the defendant in the past and did not indicate that the defendant intended to use deadly force on the day of the incident. The jury's role as trier of fact is to draw reasonable and logical inferences from the facts as it finds them to exist. *State v. Gray*, 221 Conn. 713, 721, 607 A.2d 391, cert. denied, 506 U.S. 872, 113 S.Ct. 207, 121 L. Ed. 2d 148 (1992).

Third, the evidence supports the jury's conclusion that the defendant had a duty to retreat or that he knew that he could retreat with complete safety. The jury reasonably could have concluded that the defendant could have escaped from the victim's grasp and retreated. The defendant then easily could have run out the front door to complete safety. Indeed, the defendant, after stabbing the victim, ran out the front door to a nearby baseball field.

Accordingly, we conclude that the defendant's claims of insufficient evidence are without merit.

The judgment is affirmed.

In this opinion the other judges concurred.